TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 293.

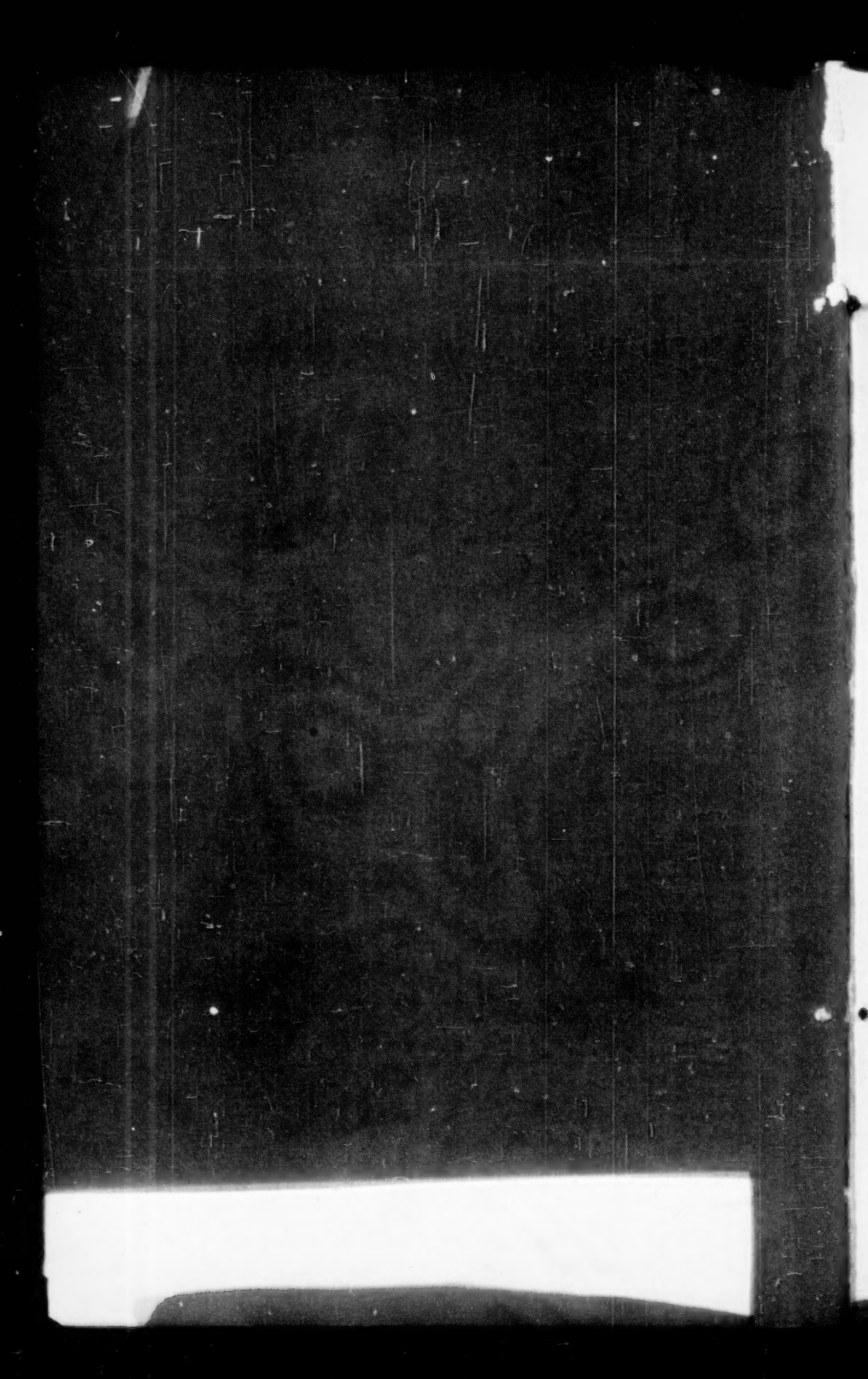
SAMUEL C. SMITH, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF SAC, IN THE STATE OF IOWA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 27, 1869.



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INDEX.

	Original.	Print.
Præcipe for summons	2	1
Summons	3	1
Declaration	6	2
Affidavit for continuance	21	7
Order of court to continue	23	8
Motion for default	25	8
Affidavit for continuance	26	8
Order of court to continue	29	9
Defendant's plea	30	10
Stipulation	33	11
Stipulation for special finding	34	11
Journal entry and order of court	35	11
Special finding of court	37	12
Bill of exceptions	43	13
Citation	55	16
Appeal bond	57	16
Writ of error	58	17
Clerk's certificate	59	18

1 Pleas in the circuit court of the United States for the district of Iowa, held at the court-house in the city of Des Moines in said district, before the Hon. Sam. F. Miller, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Wednesday, the 26th day of May, the same being the regular May term of said court, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independece the 93d year.

GEORGE B. CORKHILL, *Clerk.*

Debt.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } Petition at law.

DISTRICT OF IOWA, *ss:*

Be it remembered that on the 3d day of August, in the year of our Lord one thousand eight hundred and sixty-seven, came Sam'l C. Smith, by Richman & Carskadden, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the district of
2 Iowa, at Des Moines, in said district, his præcipie for a writ of [for a writ of] summons against the County of Sac, in the State of Iowa; which said præcipie is in the words and figures following, to wit:

United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA.

Hon. W. G. WOODWARD, *Des Moines, Iowa:*

DEAR SIR: Herewith find petition in the case of Samuel C. Smith vs. Sac County, Iowa, which please file, and issue summons to the marshal, to be served at once.

Yours, truly,

RICHMAN & CARSKADDEN.

Endorsed: Filed August 3d, A. D. 1867.
W. G. WOODWARD, *Clerk.*

On the same day, to wit, the 3d day of August, A. D. 1867, a writ of summons issued out of said clerk's office against said defendant in said entitled cause; which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

3 UNITED STATES OF AMERICA, *District of Iowa:*

To the marshal of the district of Iowa:

In the name of the President of the United States, you are hereby commanded to summon the County of Sac, in the State district of Iowa, to appear before the circuit court of the United States in and for the district of Iowa, at a term to be begun and holden at Des Moines on the third Tuesday, it being the fifteenth day, of October next, to answer unto Samuel C. Smith, a citizen of the State of New York, in an action on the bonds, warrants, & coupons of the said county, in which the pl'ff claims the sum of ten thousand dollars, with interest at the rate of ten per cent. per annum. Hereof fail not.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Des Moines, this 3d day of August, A. D. 1867, and the independence of the United States the 94th.

[SEAL.] W. G. WOODWARD, *Clerk.*

4 This summons came into my hands on the 22nd day of August, A. D. 1867, and was served on the 24th day of the same month, by reading it to Jno. Alexander, county judge of Sac County, Iowa, and to W. H. Hobbs, clerk, and to Wm. Montgomery, president of the board of supervisors, of said county; and leaving with each of them a true copy in said county.

G. W. CLARK,
U. S. Marshal Dist. of Iowa.

Marshal's fees.

Mileage, 150 miles	$9 00
Service on three, $2 00	6 00
Three copies, 50c.	1 50
	16 50

Paid by pl'ff Sept. 15th, 1867.

Endorsed: Filed Sept. 15th, 1867.

W. G. WOODWARD, *Clerk.*

5 On this day, to wit, the third day of August, A. D. 1867, came said plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause; which said declaration is in words and figures following, to wit:

6 UNITED STATES OF AMERICA, *District of Iowa:*

To the circuit court of the United States for the district of Iowa:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } Petition at law.

Said plaintiff, Samuel C. Smith, a citizen of the State of New York, complains of the defendant, the County of Sac, a corporation existing in the State of Iowa under and by virtue thereof.

And thereupon said pl'ff alleges that heretofore, to wit, on or about the 4th day of June, A. D. 1860, the defendant, in its official and corporate capacity, and by its proper and duly authorized officers and agents, and upon the petition in writing of the requisite number of voters of said county, determined to submit to the people of said county the question of the erection of a court-house therein, to cost the sum of ten thousand dollars in the bonds of said county, bearing te per cent.
interest per annum, and the question of levying an annual tax
7 in said county sufficient to liquidate said bonds, and pay the same, with accruing interest, at maturity; that thereupon, and on the 4th day of June, A. D. 1860, an order and proclamation was made by the county judge of said county, submitting the question aforesaid to the people of said county; which order and proclamation was in the words and figures following, to wit:

"STATE OF IOWA, *Sac County, ss:*

"Whereas a petition, signed by a legal number of the legal voters of Sac County, has been presented to me, asking that measures be taken for the erection of a court-house in said county; and whereas it being prescribed by law that in all such matters the question may be submitted to the people of the county: Now, therefore, be it known that I, Eugene Criss, county judge of said county, in compliance with the law in such cases made and provided, do hereby give notice to the legal voters of said county that the question will be submitted to them on the 7th day of July, A. D. 1860, at which time there will be an election held in the several townships of said county at the usual hours and places of holding elections in said county, whether or not a court-house shall
8 be erected in said county, to cost ten thousand dollars in bonds drawing ten per cent. interest per annum, the interest due, and one thousand dollars of the principal, to be paid annually until the debt is paid, and whether or not a tax shall be levied annually sufficient to liquidate the demands as they become due. And I do further declare the manner of voting shall be as follows: Upon said ballots shall be written or printed, 'For the erection of a court-house,' or 'Against the erection of a court-house,' 'For the levy of a tax,' or 'Against the levy of a tax.' And I do further declare that if a majority of the votes be cast affirmatively, them such vote shall decreed to be in favor of the proposition above submitted; and if a majority of the votes so cast are in the negative, it shall be decreed a rejection of the above proposition. The votes to be returned by the judges of the different precincts to the county court, to be thence canvassed according to law.

"Given under my hand, with the seal of Sac County affixed, at Sac City, this 4th day of June, A. D. 1860.

[SEAL.] "EUGENE CRISS, *County Judge.*"

9 And said pl'ff further alleges that, in pursuance of said order & proclamation, an election was held in the several townships of said county on the 7th day of July, A. D. 1860, at which a majority of votes was cast in favor of said proposition; and that afterwards, to wit, on the day of , A. D. 1860, there was entered on the records of said county, by said county judge, as required by law, the result of said election, in the words and figures following, to wit:

"And it appearing to the court, by the return of the sheriff of said county endorsed on the proclamation, and by other evidence, that due notice was given of said election by posting up said proclamation, duly signed & sealed, in five of the most public places in said county, including one of the most public places in each of the several townships of said county; and one of them at the door of the court-house, during a period of more than thirty days prior to the day of said election, to wit, from June 4th, A. D. 1860, to July 7th, A. D. 1860, there being no newspaper published in said county; and it appearing to the court that said election was duly held at the time and places named in said proclamation, and
10 the propsition therein contained duly submitted to a vote of the qualified electors of said county; and it also appearing upon a canvass of the votes cast at said election, duly made before the board of county canvassers and entered of record, that the whole number of votes cast for and against said propositions were (41) forty-one, of which number there were twenty-three (23) 'for the erection of a court-house and the levy of a tax,' and eighteen votes 'against the erection of a court-house, and against the levy of a tax;" and the court, being satisfied

that all the requirements of the statute in such cases had been complied with, and that a majority of the said votes cast are in favor of said proposition entire, submitted as aforesaid, hath caused the said propositions and the result of the vote to be entered of record, and doth proclaim the said propositions entire duly adopted, and made binding on said county duly authorized to issue the bonds and levy the tax as therein provided, and doth further order that notice of the adoption of said propositions be published for the time and in the manner provided by law."

All of which will appear by reference to the records of said
11 county. Said pl'ff further alleges that, in pursuance of said election, and by the authority conferred upon him by law, the said county judge made a contract with one W. U. Mesarvey for the erection and construction of said court-house for the sum of ten thousand dollars, payable in the bonds of said county, as aforesaid; and that thereupon the said county judge of said county issued the bonds of said county to the number of ten (10) for the sum of one thousand dollars each, payable 1, 2, 3, 4, 5, 6, 7, 8, 9, & 10 years after, respectively, with ten per cent. per annum thereon, payable annually, upon the surrender of the coupons thereto attached, and being payable to the bearer thereof at the Metropolitan Bank in the city of New York, and being in the words & figures following, to wit:

"$1,000. *E pluribus unum.* No.

"THE UNITED STATES OF AMERICA,
State of Iowa, County of Sac:

"The County of Sac, in the State of Iowa, hereby promises to pay to the bearer one thousand dollars on the first day of May, A. D. 186 , at the Metropolitan Bank in the city of New York, with interest at the rate of ten per cent. per annum from the first day of October, A. D. 1860, payable annually, on the first day of May in each year, at
12 the Metropolitan Bank in the city of New York, on surrender of the proper coupons hereunto attached. This obligation is one of a series of ten bonds of the like sum of one thousand dollars, and payable on the first day of May, A. D. 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, and 1871, respectively, and numbered from one (1) to ten (10), inclusive; said bonds being issued by the said county, in accordance with a vote of the legal voters thereof, at a special election holden on Saturday, the 7th day of July, A. D. 1860, pursuant to a proclamation made by the county judge of said county, according the statutes of the State of Iowa in such case made & provided, for the purpose of erecting a court-house in Sac City, the county seat of said county, as per said proclamation.

"In witness whereof, I, Eugene Criss, county judge of said county of Sac, have hereunto affixed my name, and caused the seal of Sac County to be attached at Sac City, this first day of October, A. D. one thousand eight hundred and sixty.

[SEAL OF THE COUNTY OF SAC.] "EUGENE CRISS,
"*County Judge.*"

13 The coupons attached to said bonds being in the words and figures following, to wit:

"The County of Sac will pay at the Metropolitan Bank in the city of New York, to the holder hereof, on the first day of May, 18 , one hundred dollars for interest on bond No , or the same shall be receivable

at the office of the county treasury of Sac County for payment of county tax, at the option of the holder hereof.

"$100. EUGENE CRISS, *County Judge.*"

And the pl'ff alleges and shows to the court that the aforesaid copies of said bonds and coupons are correct copies of all the bonds and coupons described & issued by said county, as aforesaid, except the numbers thereof and the respective dates of payment of the same. And pl'ff claims of said defendant the sum of twenty-five hundred & three $\frac{20}{100}$ dollars, with interest at six per cent. per annum from the maturity of the several coupons hereinafter described and set forth: which sum he alleges to be due him from said def't for and on account of the coupons hereinafter designated & set forth.

2. And for cause of such claim pl'ff alleges that he is the bearer, holder, & owner of coupon No. 2, annexed to bond No. 2 of the
14 series of bonds hereinbefore described & set forth, for the sum of one hundred dollars, and payable on the first day of May, A. D. 1862, at the Metropolitan Bank in the city of New York.

3. And for further cause of such claim pl'ff alleges that he is the bearer, holder, and owner of coupon No. 2, annexed to bond No. 3 of the series of bonds hereinbefore described and set forth, the same being for the sum of one hundred dollars, and payable on the first day of May, A. D. 1862, at the Metropolitan Bank in the city of New York.

4. And for further cause of such claim pl'ff alleges that he is the bearer, holder, and owner of coupon No. 2, annexed to bond No. 4 of the series aforesaid, for the sum of one hundred dollars, payable May 1st, at the place aforesaid.

5. And for further cause of such claim pl'ff alleges that he is the bearer, holder, & owner of coupon No. 2, annexed to bond No. 5 of the series aforesaid, for the sum of one hundred dollars, and payable May 1st, 1862, at the place aforesaid.

6. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 2, annexed to bond No. 6 of the
15 series aforesaid, the same being for the sum of one hundred dollars, payable at the time and place aforesaid. And the pl'ff alleges that each and all of the foregoing coupons were presented for payment, at maturity, at the Metropolitan Bank in the city of New York, and payment thereof demanded and refused; and that thereupon said coupons were each and all protested for non-payment, the costs & expenses theeof being the sum of three $\frac{20}{100}$ dollars; which sum he claims of def't.

7. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 3, annexed to bond No. 7 of the series aforesaid, for the sum of one hundred dollars, & payable May 1st, 1863, at the place aforesaid.

8. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 7 of the series aforesaid, for the sum aforesaid, and payable May 1st, 1864, at the place aforesaid.

5. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 7 of the series aforesaid, for one hundred dollars, payable May 1st, 1865, at the place aforesaid.

6. And for further cause of such claim, pl'ff alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 7 of the
16 series aforesaid, for the sum aforesaid, payable May 1st, 1866, at the place aforesaid.

7. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 7, annexed to bond No. 7 of the series aforesaid, for the sum aforesaid, payable May 1st, 1867, at the place aforesaid.

8. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 8 of the series aforesaid, for the sum aforesaid, payable May 1st, 1863, at the place aforesaid.

9. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 8 of the series aforesaid, for the amount aforesaid, payable May 1st, 1864, at the place aforesaid.

10. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 8 of the series aforesaid, for the sum aforesaid, payable May 1st, 1865, at the place aforesaid.

11. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 8 of the series aforesaid, for the sum aforesaid, payable May 1st, 1866, at the place aforesaid.

12. And for further cause of such claim pl'ff alleges that he is
17 the holder & owner of coupon No. 7, annexed to bond No. 8 of the series aforesaid, for the amount aforesaid, payable May 1st, 1867, at the place aforesaid.

13. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 3, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1863, at the place aforesaid.

14. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1864, at the place aforesaid.

15. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 5, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1865, at the place aforesaid.

16. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 6, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1866, at the place aforesaid.

17. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 7, annexed to bond No. 9 of the series aforesaid, for the amount aforesaid, payable May 1st, 1867, at the place aforesaid.

18 18. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 2, annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1863, at the place aforesaid.

19. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 3, annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1864, at the place aforesaid.

20. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 4, annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1865, at the place aforesaid.

21. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No 5, annexed to bond No. 18 of the series aforesaid, for the amount aforesaid, payable May 1st, 1866, at the place aforesaid.

22. And for further cause of such claim pl'ff alleges that he is the holder & owner of coupon No. 6 annexed to bond No. 10 of the series aforesaid, for the amount aforesaid, payable May 1st, 1867, at the place aforesaid.

And pl'ff alleges that coupons Nos. 2, 3, 4, 5, & 6, annexed to bond No. 10, being the five last coupons hereinbefore described, and
19 appearing to be due and payable on the first day of May, in 1863, 1864, 1865, 1866, & 1867, respectively, were, in fact, due & payable on the first day of May, 1862, 1863, 1864, 1865, & 1866, respectively; and, through error and mistake of the officers and agents of said county, were made payable one year later than their actual maturity; that said coupons became due as follows: No. 2, in 1862; No. 3, in 1863; No. 4, in 1864; No. 5, in 1865; No. 6, in 1866, and properly bear interest from said dates.

And pl'ff further alleges that he is the holder & owner of each and all of the coupons hereinbefore described; that he received the same in good faith before maturity, and paid value therefore. That said coupons were all duly presented at the Metropolitan Bank in the city of New York, for payment at maturity, and payment thereof demanded; which was by said bank refused. That the bonds and coupons aforesaid were issued by said county, under & by virtue of legal, competent, and proper authority conferred upon the officers & agents of said county as aforesaid, and the same are valid and legal claims against the def't. That said bonds & coupons were issued with the seal of
20 said county and the signature of its county judge attached or annexed thereto. That correct copy of each said bonds & coupons is hereinbefore set forth and incorporated into this petition, and excepting the dates & numbers thereof, which are afterwards set forth in said petition fully & at large. Pl'ff further alleges that said claims are still his property, and that the amount hereinbefore claimed is still due thereon. He therefore asks judgement for said amount, with interest & costs.

RICHMAN & CASKADDAN,
Att'ys for Pl'ff.

Endorsed: Filed August 3d, 1867.

21 On this day, to wit, the 16th day of October, A. D. 1867, came the defendant, by Polk & Hubbell, its attorneys, and file an affidavit for a continuance in words and figures following, to wit:

In U. S. circuit court, district of Iowa.

SAMUEL C. SMITH, PL'FF,
vs.
SAC COUNTY, IOWA, DEF'T.

The defendant moves the court to continue this cause, & for an order extending the time for pleadings herein for reasons set forth in the affidavit herewith filed.

POLK & HUBBLE,
Att'ys for Def't.

UNITED STATES, *District of Iowa, ss:*

I, J. S. Polk, do state on oath that I am one of the attorneys for def't herein; that this is the appearance term for this cause, the same having been instituted by serving the summons on def't on the 24th day of August, A. D. 1867; that defendant has, as I am informed and verily believe, a good defense herein; that owing to the short period of time that has elapsed since the suit was instituted, and the great distance of def't from Des Moines, & the difficulty of communication with def't, I am not sufficiently advised of the facts upon which it basis its
22 defense at this time to prepare an answer herein, & get the cause ready for trial.

J. S. POLK.

Subscribed & sworn to before me by J. S. Polk this 16th day of October, 1867.

W. G. WOODWARD, *Clerk.*

23 On this day, to wit, the 17th day of October, A. D. 1867, of said court, at the regular October term thereof, in the record of the proceedings in said entitled cause is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

This cause now coming on to be heard, on the application for time to answer and a continuance, it is ordered that the defendant have leave to answer in ninety days, and that the cause be continued.

24 On this day, to wit, the 5th day of February, A. D. 1868, comes the plaintiff, by his attorney, and moves for a default against the defendant in the above-named case, in the words and figures following, to wit:

25 In the circuit court of the United States within & for the State of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } SS: No. 439.

FEBRUARY 5, 1868.

Now comes the said plaintiff, by his attorneys, Richman & Carskadden, and demands of the court a default against the defendant for & on account of the failure of said def't to answer the petition of the pl'ff within ninety days, and serve copy thereof upon the attorneys of the pl'ff, as required by the ord'r of this court at the October term thereof, A. D. 1867.

RICHMAN CARSKADDAN,
Attorneys for Pl'ff.

On this day, to wit, May 15th, A. D. 1868, came the defendant, by its attorney, and files an affidavit for a continuance in the above-entitled cause in words and figures following, to wit:

26 SAMUEL C. SMITH
vs.
SAC COUNTY.

I, John Alexander, an attorney for Sac County, Iowa, do solemnly swear that Eugene Criss is a very material witness for the defendant

in the above-entitled cause, and that said witness resides at Sac City, in Sac County, Iowa, and that said Criss was duly subpœnaed to appear at the present term of this court, on the part of the defendant, and that I have been expecting the said Criss would appear in obedience to said subpœna, but that he has failed-to appear, although he had informed deponent that he would be here to testify at the time mentioned in said subpœna; and deponent further states that he has relied upon the said Criss being here to testify in said cause, and has prepared his defense to said action with reference to the testimony of the said Criss, and that he expects to prove, by the said Criss, that the contract for building the court-house, for which the bonds were given to which the
27 coupons sued upon were attached, was not executed in the county of Sac, and that the bonds were not executed in said county, and that the record of the issuing of said bonds is not correct, and that they were not executed as set forth in said record, and that the county has never received any consideration for the issuing of said bonds and coupons, and that no work was ever done upon the court-house for the building of which the said bonds were issued, and that the same were issued in fraud of the rights of the said county by the county judge thereof. I do further state, I know of no other witness by whom the facts above set forth can be so fully proven, and that I cannot safely proceed to trial without the testimony of said witness; and that, if said cause is continued until the next term of court, I can procure the attendance of the said Criss, or his testimony, to use upon said trial.

JOHN ALEXANDER.

Subscribed and sworn to before me this 15th day of May, A. D. 1868.

W. G. WOODWARD, *Clerk*,
By L. KINSEY.

28 SAMUEL C. SMITH
vs.
SAC COUNTY.

Now comes the defendant in the above-entitled cause and moves the court that the same be continued until the next term of this court, and in support of such application files the affidavit of John Alexander; and, for further grounds of such continuance, state that the witnesses reside at a great distance from this place, who have been subpœnaed on the part of the def't, and that it would be a great hardship to compell them to remain until after the adjournment and defend, and further urges the great impossibility that the cause will be reached for trial at this term, and therefore makes this application.

JOHN ALEXANDER,
Att'y for Def't.

29 On this day, to wit, Wednesday, May 27th, A. D. 1868, at the May term of said court, in the records and proceedings thereof in the said entitled case is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

This day this cause, coming on for hearing, was continued.

On this day, to wit, Wednesday, Oct. 28th, 1868, at the October term

of said court, in the records and proceedings thereof in the said entitled case is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

This day this cause, coming on for hearing, is continued generally.

30 U. S. circuit court, district of Iowa.

SAMUEL C. SMITH, PL'FF,
vs.
SAC COUNTY, IOWA, DEF'T. } Answer.

The defendant, for answer to pl'ff petition, says—

1st. That it denies that any such election as is set out in pl'ff petition was called or held; denies that the electors of said county (a majority of them) in favor of building a court-house & issuing bonds in payment therefore; denies that any such bonds or coupons were issued, or any such contract let for building a court-house; denies that the county judge had any authority to call such election, or make such contract, or issue such bonds or coupons; def't further denies each & every other allegation in pl'ff's petition.

II. The def't further states that said bonds & coupons were issued without authority of law, & that pl'ff at the time that he purchased the same had full knowledge of the facts.

III. That on or about the 21st day of Sept., A. D. 1860, one
31 Eugene Criss, claiming to act as the county judge of def't, in pursuance of a pretended vote of the electors of said county, did make and enter into a contract with one W. N. Meservy, whereby it was agreed by the said Meservy to build a court-house for def't, at Sac City its county seat. Said court-house to be commenced on the of , 186 , and completed on or before the 1st day of August, 1862, and the said county judge aforesaid agreed & undertook, in behalf of the county, to pay said Meservy for such house the sum of ten thousand & to issue bonds on said county to him for said sum; said bonds to run one, two, three, four, five, six, seven, eight, nine, & ten years, & to be fore one thousand dollars each, to draw ten per cent interest from date, and payable on the first day of May each year; that the bonds & coupons set out in pl'ff petition were issued in pursuance of, & as a part of, said contract for building said court-house, & were delivered to said Meservy on the day they were executed, to wit, the first day of October, A. D. 1860; that the said Meservy has wholly failed & refused to
32 build said court-house or any part thereof, nor has he done any work thereon, or taken any steps towards the building the same, and has in every particular failed & refused to comply with his part of said contract; that the consideration of such bonds and coupons has wholly failed, & according to a statute of Iowa, in such cases made and provided, no part of the amount due on said bonds or coupons could be drawn from the county treasury and paid thereon until the work should have been actually commenced in good faith, which has not been done. The defendant states that the pl'ff had full & complete knowledge of all such facts at the time he purchased said bonds, and took the same subject to the rights & equities of def't herein.

IV. That said bonds were not issued in pursuance of said vote, and were not payable as directed thereby, and are therefore void,

POLK, HUBBLE & BARCROFT,
Att'ys for Def't.

On this day, to wit, the 21st day of May, 1868, the parties above-entitled case filed a stipulation in words and figures following, to wit:

33 United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
SAC COUNTY.

In this cause it is stipulated that plaintiff shall have thirty days from this date to prepare and serve by copy on def't's att'ys, at Fort Dodge, special findings of the court and a bill of exceptions; and that defendant's att'ys shall have thirty days from receipt of same to prepare and serve on plaintiff's att'ys amendments to same; and that the same shall be signed & sealed by the court as of the present May term.

May 21st, 1869.

CARSKADDAN & ROGERS, *for Pl'ff.*
GALUSHA PARSONS,
W. L. JOY, *Def'ts Att'ys.*

34 In United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC. } No. 439.—Stipulation.

It is hereby stipulated and agreed by the parties to the above-entitled cause, that the same may be tried to the court without the intervention of a jury; and that the court shall find specially upon the facts.

RICHMAN & CARSKADDEN,
& J. N. ROGERS, *Att'ys for Pl'ff.*
GALUSHA PARSONS,
W. L. JOY, *Def't's Att'ys.*

35 On this 29th day of May, A. D. 1869, at the May term of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC.

The issues of fact in this cause having been tried by the court without a jury, pursuant to the written stipulation of the parties on file, and the court having found the facts specially, together with its conclusions of law thereon, that defendant is entitled to judgment in its favor; now, on motions of Messrs. Joy & Parsons, def't's attorneys for defendant, it is considered and adjudged that the plaintiff take nothing by his action, and that the defendant recover its costs herein taxed, at $ and that execution issue therefor; to which ruling of the court the plaintiff then and there excepted, and by agreement of parties the bill of exceptions shall be settled and signed by the judge as of the present term.

36 On this day, to wit, the 29th day of May, A. D. 1869, in the record of proceedings thereof in said entitled cause, is the following entry, to wit:

37 United States circuit court, district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC. } No. 439.

This cause now coming on for trial on the issues joined therein, and the plaintiff appearing by J. Carskaddan and J. N. Rogers, his attorneys, and the defendant by W. N. Joy and G. Parsons, its attorneys, the said parties file their written stipulation to try the cause to the court without a jury.

And the court, having heard the evidence & arguments of counsel for the respective parties, makes a special finding in writing, in the words following, to wit:

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC. }

In this cause the court, on the evidence, finds the facts to be as follows, to wit:

1st. That an order & proclamation was made by Eugene
38 Criss, county judge of said county of Sac, for submitting to the vote of the people of said county "whether or not a court-house should be erected in said county, to cost ten thousand dollars, in bonds drawing ten per cent. interest per annum; the interest due, and one thousand dollars of the principal, to be paid annually until the debt is paid; and whether or not a tax shall be levied annually sufficient to liquidate the demands as they became due," in manner and form as the same is alleged and set forth in the plaintiff's petition herein.

2d. That a special election was held in said county on the 7th day of July, A. D. 1860, in accordance with, and in pursuance of, said order & proclamation; and that said proposition was adopted by a majority of the votes cast at said election.

3d. That the said proposition and the order for the submission of the same, together with a statement of the result of said election, was afterwards, by and under the direction of the said county judge, entered and recorded at large in the office of the said county judge in the "minute-book" of the county judge & county court, in manner and form as the same are set forth and copied in the petition of the plaintiff herein.

39 That by the said record entry the said order for the submission of the said proposition to the vote of the people appears, and purports to have been made at a session of the county court on the 4th day of June, A. D. 1860; but that said record was not in fact made and entered in said "minute-book" at that time, nor until after the execution and delivery of the bonds, as hereinafter found; and that the said order was entered in said "minute-book" in June, 1861, after the said Criss had ceased to have any power or jurisdiction over the financial business of the defendant.

4th. That the said Eugene Criss, county judge of said county, having entered into a contract, in behalf of said county, with one W. N. Mes-

ervy, for the erection by the said Meservy of a court-house in and for said county, did, on or about October 1st, 1860, execute, in behalf of said county, by affixing thereto his signature as such county judge, and the lawful seal of said county, and deliver to said Meservy, in pursuance of the terms of said contract, ten certain bonds, or instruments, purporting to be the bonds of said county, dated October 1st, 1860,
40 each being for the payment to the bearer of one thousand dollars, with interest thereon at the rate of ten per cent. per annum, payable annually; and which said bonds were severally and respectively payable in one, two, three, four, five, six, seven, eight, nine, & ten years after date, at the Metropolitan Bank in the city of New York. And said county judge also executed, in like manner, coupons or interest warrants annexed to said bonds, and each of them, for the several annual installments of interest to grow due thereon as aforesaid, being for one hundred dollars each, & payable to bearer at said bank, or receiveable for taxes at the county treasury of said county, at the option of the holder. Said bonds and coupons were all expressed in the same words & figures precisley, except as to the numbers and date of maturity thereof; & correct copies thereof are contained and set forth in plaintiff's petition herein.

5th. That the said county judge in fact signed, sealed, & delivered said bonds and coupons as aforesaid at Fort Dodge, in the county of Webster & State of Iowa, and not within the county of Sac;
41 and that the contractor, Meservy, gave one of said bonds for $1,000 as a gratuity to the county judge as soon as the same were delivered by said county judge to said Meservy; and r house was in fact ever built by said contractor, or any other p pursuance of said contract.

6th. That the plaintiff, Samuel C. Smith, was, at the time mencing this action, and still is, the holder & owner of twent the coupons or interest warrants aforesaid, being those specif declared on in the petition herein; that because such holder, by t thereof to him before maturity, and after the entry of said proc in the "minute-book," as hereinbefore found; that said coupon at the commencement of this action, and still are, wholly unpaid.

And, as matter of law arising upon, and resulting from, the hereinbefore found, the court is of opinion and adjudges that th bonds & coupons are wholly void as against the said county
42 and that the defendant is entitled to judgement; that plaintiff take nothing by his suit and for its costs; to which opinion and judgement the plaintiff accepts.

J. M. LOVE, *Judge, &c.* [SEAL.]

43 And now, on this day, to wit, the 30th day of August, A. D. 1869, came the plaintiff, by his attorneys, Carskaden & Rogers, and filed in said clerk's office its bill of exceptions in words and figures following, to wit:

43½ Circuit court of the United States, district of Iowa.

SAMUEL C. SMITH *vs.* THE COUNTY OF SAC. } No. 439.—May term, 1869. Plaintiff's bill of exceptions.

Be it remembered that on the trial of [of] this cause, the same being tried to the court without the intervention of a jury, pursuant to the written stipulation of the parties, the plaintiff, in order to maintain the

issue on his part, produced & read in evidence an instrument purporting to be a bond executed by the county of Sac, and bearing the genuine signature of the county judge, and the lawful seal of said county thereunto affixed, dated October 1st, 1860, for the sum of one thousand dollars, and payable on the first day of May, A. D. 1868, at the Metropolitan Bank in the city of New York, with interest at the rate of ten per centum per annum, payable annually on the 1st day of May in each year at the said bank, on the surrender of the proper coupons thereunto attached, of which said bond a true copy (except as to number &
44 time of maturity) is contained and set forth in the plaintiff's petition herein. The plaintiff further produced and read in evidence the several coupons or interest warrants on which this action is brought, being in manner & form the same as they are described & set forth in the petition herein, & having also the said signature of the county judge, and seal of the county of Sac affixed to each of them.

The plaintiff also produced the original record book of the county judge & county court of Sac County, known and disignated as the "minute-book," and read in evidence therefrom a certain record contained in said "minute-book," and being a record of the order & proclamation, and result of the vote on the question of building a court-house in said county, & issuing the bonds of the county therefor, and levying a tax for the payment of said bonds, and the interest thereon, and being the same record copied into the petition of the plaintiff herein, and being immediately preceded in said "minute-book" by an entry under date of Dec. 7th, 1860, and immediately followed by an entry under date
45 of January 5th, 1861, and the plaintiff thereupon rested his case.

And the defendant, to maintain the issue on his behalf, offered as a witness one William H. Hobbs, who, being sworn, testified:

That he was clerk of the district court of Sac County, Iowa, and ex officio of the county court thereof, during the year 1860; and that, as such clerk, he had access to the "minute-book" in which the proceedings of the county judge and county court were recorded. And the defendant offered to prove by the witness that the said record, so read in evidence by the plaintiff, and designated by the witness as the "court-house record," was not actually written and entered in said "minute-book," and signed by the county judge of said county until on or after December 30th, 1860.

And the plaintiff thereupon objected to the introduction of said testimony for the following reasons:

1st. It would tend to impeach the public record of the defendant, the County of Sac.

2d. It would tend to contradict the recitals of the bonds issued
46 by the defendant.

3d. It would not affect the question of the power of the county judge to issue said bonds.

4th. The said evidence would be immaterial, & should not be admitted to prejudice the rights of the plaintiff, he being an innocent holder of the coupons in suit for value, and before maturity.

The defendant having stated to the court that said testimony was offered as tending to prove that said record was a forgery, the court overruled the plaintiff's objections, and admitted said testimony for that purpose only, to which ruling & decission of the court, and to the admission of which testimony, the plaintiff then & there excepted, and the said witness accordingly testified to the matters which the defendant had so offered to prove by his testimony.

And in the further trial of said cause, the defendant, in support of the issues therein, on its behalf, called as a witness one M. N. Meservy, who, being sworn, testified:

47 That he was the contractor for building a court-house in Sac County, pursuant to the proclamation & vote set forth in plaintiff's petition herein, and that the ten bonds mentioned & described in pl'ff's petition, with the proper coupons thereunto attached, were issued and delivered to him as such contractor by Eugene Criss, then county judge of said county, and nine of said bonds, with the coupons thereunto attached, were subsequently sold by him, the witness.

And therepon the defendant offered to prove by the said witness that the said "court-house record," in the minute-book of Sac County, so read in evidence by the plaintiff, and testified of by the witness Hobbs, was entered in said minute-book in the summer of 1861, and not until after the execution and delivery to the witness of said bonds and coupons.

And thereupon the plaintiff objected to the introduction of said testimony for the same reasons that he had before objected to similar testimony of the witness Hobbs, and the court overrul'd the plaintiff's

48 said objections and admitted the said testimony for the purpose aforesaid; to which ruling & decision and the admission of which testimony the plaintiff then & there excepted. And said witness accordingly testified to the effect to which his testimony was so offered and admitted.

And the defendant further offered to prove by the said witness (Meservy) that the aforesaid bonds of Sac County, so issued and delivered to him, were signed & sealed with the county seal by the said county judge & delivered to him (Meservy) at his (Meservy's) office at Fort Dodge, in Webster County, Iowa, and not within the county of Sac. And the plaintiff thereupon objected to the admission of said testimony for the following reasons:

1st. It would contradict the recitals contained in the said bonds.

2d. It would contradict the public records of the county, defendant.

3d. It would only show an irregularity on the exercise of any expressly conferred power.

49 4th. It could not affect the rights of the plaintiff as a bona-fide holder of the coupons in suit before the maturity.

5th. The said matters so offered to be proved are wholly immaterial, and in no way affect the validity of said bonds in the hands of any holder thereof.

And the court overruled the plaintiff's said objections, and admitted the said testimony; to which ruling and decision of the court, and the admission of which testimony the plaintiff then & there excepted.

And the said witness accordingly testified to the effect to which his testimony was so offered and admitted.

And the defendant further gave testimony tending to prove that after the county judge at the town of Fort Dodge, as aforesaid, executed & delivered said bonds to said Meservy, he, the said Meservy, returned one of said bonds to said county judge as a bribe to said officer; and further that no court-house was ever erected by said Meservy or

52 any other person in pursuance of the contract on which said bonds were executed & delivered.

To all of which testimony and to the admission thereof the plaintiff objected for the following reasons:

1st. The said testimony is immaterial, and cannot affect the rights of the plaintiff as a bona-fide holder of the coupons in suit before the maturity thereof.

2d. The said testimony does not establish any facts which invalidate said bonds in the hands of an innocent holder.

3d. The said testimony does not affect the validity of said bonds & coupons.

And the court overruled the plaintiff's said objections, and admitted the said testimony; to which ruling & decision of the court and to the admission of which testimony the plaintiff then & there excepted.

53 And because none of the said exceptions so offered and made to the rulings & decisions of the court, and to the admission of the aforesaid testimony, so as aforesaid objected to, do appear upon the record of the said trial, therefore the plaintiff prays the court to sign & seal this his bill of exceptions; which is accordingly done.

[SEAL.] J. M. LOVE, *Judge, &c.*

Indorsed: Filed August 30th, 1869.

GEORGE B. CORKHILL, *Clerk.*

54 On this day, to wit, the 20th day of October, A. D. 1869, at the Oct. term, A. D. 1869, of said court, in the proceedings thereof in said entitled cause, is the following entry, to wit:

55 UNITED STATES OF AMERICA, *ss:*

To the county of Sac, in the State of Iowa, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein Samuel C. Smith is plaintiff and the County of Sac, in the State of Iowa, are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Love, district judge for the district of Iowa, this 20th day of October, in the year of our Lord, 1869,

J. M. LOVE, *District Judge.*

Due service of the above citation, and of a copy of the writ of error therein mentioned, is hereby acknowledged this 21st day of October, 1869.

GALUSHA PARSONS,
Att'y for County of Sac, Def't in Error.

(Indorsed:) U. S. circuit court, district of Iowa. Samuel C. Smith vs. Sac County. Citation on error to Supreme Court.

Filed Oct. 26, 1869.

GEORGE B. CORKHILL, *Clerk.*

Richman & Carskaddan, att'ys for pl'ff.

56 On this day, to wit, the 20th day of Oct., A. D. 1869, came said plaintiff, and filed his appeal bond in said entitled cause; which said bond is in words following, to wit:

57 Circuit court of the United States for the district of Iowa.

SAMUEL C. SMITH
vs.
THE COUNTY OF SAC, IN THE STATE OF IOWA. } Bond.

Know all men by thes presents, that we, Samuel C. Smith, of the city & State of New York, as principal, and J. Carskadden, D. C. Rich-

man, and W. H. Stewart, of the city & county of Muscatine, as sureties, are held and firmly bound unto the County of Sac, in the State of Iowa, in the sum of five hundred dollars, to be paid to the said County of Sac, its lawful authorities and representatives, to which payment, well & truly to be made, we bind ourselves, and each of us, jointly & severally, and our and each of our heirs, executors, and administrators. Sealed with our seals, and dated this 26th day of August, A. D. 1869.

Whereas the above-named Samuel C. Smith hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the
57½ judgement rendered in the above-entitled suit by the circuit court of the United States, within and for the district of Iowa: Now, therefore, the condition of this obligation is such, that if the above-named Samuel C. Smith shall prosecute his said writ of error to effect, and answer all costs, if he shall fail to make good his plea, then this obligation to void; otherwise to be and remain in full force & virtue.

SAMUEL C. SMITH, [SEAL.]
By RICHMAN & CARSKADDAN, *his Att'ys.*
J. CARSKADDAN. [SEAL.]
D. C. RICHMAN. [SEAL.]
W. H. STEWART. [SEAL.]

Sealed & delivered in presence of—
THOS. D. SMITH.

Approved:

J. M. LOVE, *D's't Judge.*

(Indorsed:) Filed Oct. 20th, 1869.
GEORGE B. CORKHILL, *Clerk.*

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court before you, between Samuel C. Smith, plaintiff, and the County of Sac, in the State of Iowa, defendant, a manifest error hath happened to the great damage of the said Samuel C. Smith, as by his complaint appears, and we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this day of October, in the year of our Lord one thousand eight hundred & sixty-nine, and of the independence of the United States the 94.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Circuit Court District of Iowa.

(Indorsed:) U. S. circuit court, district of Iowa. Samuel C. Smith vs. Sac County. Writ of error to Supreme Court.

Filed Oct. 20th, 1869.

GEORGE B. CORKHILL, *Clrk.*

Richman & Carskaddan, plff's att'ys.

59 I, George B. Corkhill, clerk of the circuit court of the United States for the district of Iowa, do hereby certify the foregoing transcript, from pages 1 to 59, inclusive, to contain a full, true, and perfect copy, from the record, of all the proceedings of said court in said cause, wherein Samuel C. Smith was plaintiff, and the County of Sac was defendants, as the original of the same now remains in my custody; and I further certify that the writ of error sued out by said Samuel C. Smith, plaintiff in error in said cause, is annexed to said transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Des Moines, in said district, this 15th day of Nov., A. D. 1869.

[SEAL.] GEORGE B. CORKHILL, *Clerk.*

(Indorsement on record:) Iowa C. C. U. S. No. 293. Samuel C. Smith, plaintiff in error, vs. the County of Sac.

Filed 27th November, 1869.

Supreme Court of the United States.

SAMUEL C. SMITH, Plaintiff in Error, *vs.* THE COUNTY OF SAC, IN THE STATE OF IOWA.	*Error to the U. S. Circuit Court for Iowa.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This was an action brought by the plaintiff in error, a citizen of New-York, against the County of Sac, Iowa, upon coupons for interest on certain bonds of the county, issued for the purpose of paying for the building of a court-house. The petition alleges the adoption by vote of the people of the county, at a special election held July 7th, 1860, of a proposition submitted to them by the county judge, providing for the erection of a court-house, to cost $10,000, and the issuing of bonds to that amount, drawing interest at ten per cent. per annum, said interest and $1,000 of the principal to be paid annually, until the whole should be paid, and that a tax should be levied annually, sufficient to pay the same; that said proposition and the result of the vote thereon were duly recorded as required by law; that the bonds were issued accordingly; that the plaintiff is the holder of certain past due coupons for interest accrued thereon, amounting to $2,500, which sum, with interest, he seeks to recover. Copies of the proposition submitted, the record of the vote thereon,

se,

and the bonds and coupons are made part of the petition. The bonds are payable to bearer, signed by the county judge, and with the county seal affixed, and recite on their face that they are "*issued by the said county, in accordance with a vote of the legal voters thereof, at a special election holden on Saturday, the 7th day of July, A. D.* 1860, *pursuant to a proclamation made by the county judge of said county, according to the statutes of the State of Iowa in such case made and provided, for the purpose of erecting a court-house in Sac City, the county seat of said county, as per said proclamation.*" The concluding clause reads thus: "In witness whereof, I, Eugene Criss, County Judge of said County of Sac, have hereunto affixed my name, and caused the seal of Sac County to be attached, *at Sac City*, this first day of October, A. D. 1860." The coupons are payable to the holder, and signed by the county judge, and with the bonds were purchased by the plaintiff in error, in good faith, before maturity.

Defendant's answer—1st. Denies the allegations of the petition; 2d. Avers that the county judge made a contract with one Messervey, September 21st, 1860, for the building of the court-house for $10,000 in bonds, and delivered the bonds to the contractor, on the day of the date thereof; that the court-house was never built by the contractor, whereby the consideration of the bonds has wholly failed; that plaintiff had notice thereof before he purchased the bonds.

The cause was tried by the court without a jury, in pursuance of a written agreement of the parties.

The court made a special finding of facts, in the nature of a special verdict, (Record, pp. 12, 13,) finding the submission of the proposition by the county judge to the people of the county, the vote adopting the same, and the recording thereof, the execution and issue of the bonds and coupons, the transfer of the coupons sued on to the plaintiff before maturity, his present ownership thereof, and that they were unpaid; all as alleged in the petition.

It was further found, that, by the record entry thereof, the county judge's order for the submission of the question

to popular vote appears to have been made June 4th, 1860; but that the said record was not in fact made and entered in the record-book at that time, nor until after the execution and delivery of the bonds; that it was actually entered in said book in June, 1861, "after the said Criss," (*i. e.*, the county judge,) "had ceased to have any power or jurisdiction over the financial business of the defendant;" but *before* the transfer of the coupons sued on to the plaintiff.

It was further found, that the bonds were delivered to one Messervey, the contractor for building the court-house, in pursuance of the contract between him and the county; that the county judge in fact affixed his signature and the county seal to the bonds, and delivered them to said Messervey at a place beyond the limits of Sac County; that Messervey gave one of the bonds as a gratuity to the county judge, as soon as he received them; and that no court-house was ever built in pursuance of the contract. It is *not* found that the plaintiff, when he purchased the bonds, had notice of any of these facts.

As matter of law resulting from the facts found, the court held that the bonds were wholly void, and that defendant was entitled to judgment, which was rendered accordingly.

On the trial, plaintiff excepted to the admission of the oral testimony offered by defendant to prove the time of the actual making up of the record, the place of and circumstances attending the execution and delivery of the bonds, and the non-erection of the court-house, on the grounds of immateriality, that the evidence contradicted the record, *and the recitals in the bonds, that plaintiff was a bona fide holder without notice*, &c., &c.

(See bill of exceptions, pp. 13—16.)

On the judgment rendered as above, plaintiff brings error.

ARGUMENT.

I.

The bonds which form the subject of this suit, though issued for a different purpose from those which have so often of late come before this court from Iowa, have been held by the Supreme Court of that State to derive their support from the same statutory provisions; a support, in this case, unincumbered by any doubt or controversy as to its legal sufficiency; "the erection of public buildings" being an object expressly named as one for which a county may borrow money.

Code of Iowa, 1851, secs. 114—124.
Revision of 1860, secs. 249—260.

And see,

Hull and *al. vs.* Marshall County, 12 *Iowa*, 142.

II.

As to the due observance of all the steps prescribed by the statute in order to call into exercise the power conferred, the plaintiff might well rest his case on the rule several times laid down by this court, that where a municipal corporation has power, under any circumstances, to issue negotiable securities, it will be conclusively presumed in favor of a *bona fide* holder, for value, that they were in fact issued under the circumstances which would authorize them.

Gelpcke *vs.* Dubuque, 1 *Wall.* 175, (203.)
Knox Co. *vs.* Aspinwall, 21 *How.* 539.
Rogers *vs.* Burlington, 3 *Wall.* 654.
Supervisors *vs.* Schenck, 5 *Ib.* 772, 784.

So, also, the case might be rested on the decisions holding the corporation *estopped* as to such matters, *by the recitals on the face of its bonds.*"

Moran *vs.* Miami Co., 2 *Black.* 722.
Mercer Co. *vs.* Hacket, 1 *Wall.* 83.
Van Hostrup *vs.* Madison, *Ib.* 291.
Meyer *vs.* Muscatine, *Ib.* 384.

III.

But the court below has found that all the statutory prerequisites were *in fact* complied with; unless it be claimed that the power to issue is derived, not from the *actual* adoption by popular vote of the proposition submitted by the county judge, but upon the formal entry thereof of record, and that this latter step must precede the execution of the bonds, or they will be void even in the hands of a *bona fide* holder who purchased them *after* the record had been duly made up, and without notice of its having been done after the execution of the bonds, *and with the statement on the face of the bonds that this step had been duly had and taken;* which is the precise attitude of the present plaintiff.

It is submitted, however, that such a position is wholly untenable; nor was it made, in any degree, the basis of the decision in the court below. It will be observed, on reference to the bill of exceptions, (p. 14,) that the evidence as to the time when the record was in fact made up, was offered and received for the sole purpose of proving it to have been *forged*. The court, however, has not found such to be the fact, but has found facts which establish the record as perfectly authentic, viz.: that the matters set forth in it are true in fact, and that the record was made under the direction of the proper officer, the county judge. The finding that it was made "after he had ceased to have any jurisdiction over the financial affairs of the county," does not mean that he had gone out of office, which was not the fact; but refers to a change in the law, which took effect January 1, 1861, transferring the management of the "financial affairs" of the county from the county judge to a board of supervisors.

Rev. of 1860, chap. 22, art. 11, p. 48; sec. 324, p. 53.

IV.

The fact on which the judgment below for the defendant was entirely rested was, that the county judge in

vantages, without going beyond the territorial limits of his county. It is not to be presumed that the legislature intended to disable a county, in its corporate capacity, from entering into a contract, or making a purchase, unless done within its own territory, and certainly no rule of the common law so disables it, any more than any other corporation. But this is the necessary result of the views held by the court below; for if the county judge, the regular agent of the county for such purposes, is smitten with paralysis of all his functions the moment he crosses the county line, obviously the same is true of his *locum tenens*, the prosecuting attorney; and again of *his* successor, the county clerk; and the result is, that the county, as a corporate body, is absolutely shut up within its own territory in respect to every dealing which it can have with other parties.

In this case, the particular acts alleged to be invalid, because done by the judge beyond the boundaries of the county, are the signing, sealing and delivery of bonds for the payment of money. It is the *delivery*, not the signing and sealing, which gives effect to the instrument. The particular *locality* where the signature and seal are affixed is of no importance. Suppose the judge, after signing and sealing the bonds, had brought them back into Sac County, and there delivered them; no one would claim that they were invalidated by having been *executed* outside of the county. But the act of *delivery*, which alone gives vitality to the obligation, is certainly one which needs neither to be performed by the county judge's own hand, nor within the county. It might be done by any duly authorized agent, and as effectually at the City of New-York, where they were made payable, as at "Sac City." Securities of this kind are usually and most readily negotiated in the great commercial cities of the land, and that these were intended to be negotiated outside the county is evident from their being made payable in the City of New-York, where the plaintiff in error bought them. The county judge clearly had power to appoint an agent to negotiate these bonds in New-York, Boston, or elsewhere, and to entrust him

with the bonds for delivery to purchasers. Will it be pretended that, having power to delegate this function to another, he could not discharge it himself, that is, virtually constitute *himself* such an agent? That is what the argument on the other side must come to.

V.

The argument last advanced would sustain the validity of the bonds in the hands of the original holder. But aside from this, the plaintiff is protected by the rules applicable to *bona fide* transferrees of negotiable paper. Those rules apply in all their force to such paper when issued by municipal corporations, equally as to that of private persons, as has been frequently and forcibly illustrated by the recent decisions of this court. If the negotiable bonds of a county, authorized by law, and authenticated on their face by the proper official signatures and seal, get into circulation improperly through the malfeasance or misfeasance of the county officers, the same consequences follow as in case of a private individual, whose notes, bearing his genuine signature, are improperly put into circulation by his agent. If, before maturity, they come into the hands of *bona fide* holders for value, in either case they must be paid.

It is found that the plaintiff became the holder of these obligations *before maturity, and it is not found that he had any notice of any of the matters relied on to invalidate them.* Is it to be held that every purchaser of such securities must ascertain, at his peril, whether the officer who executed them on behalf of the county was physically within its boundaries when he did so? and that he must ascertain this, even when the instruments recite on their face, as in this case, that they were executed *at the county seat?* We apprehend not.

State of Illinois
vs. Delafield
8 Paige 527, 533.
Same Case
2 Hill 159, 177.
per Bronson, J.
Supervisors v Schenck
5 Wall. 772, 784.

VI.

It will hardly be claimed, we presume, that the failure of the contractor, to whom the bonds were originally delivered, to fulfill his contract for building the court-house,

constitutes any defence against the plaintiff, who had no notice of such failure of consideration. In fact, there *was no failure of consideration.* For the bonds having been delivered to the contractor *in advance, as provided for by the contract between him and the county*, his *executory agreement* to build the court-house, and not its actual erection, was the consideration. Authority is hardly needed in support of this position, but we will refer to a recent case fully in point, viz.:

Davis *vs.* McCready, 17 *N. Y.* 230, of which the syllabus is: "The breach of an executory contract which formed the consideration for the acceptance of a bill of exchange, is not a defence in whole or in part against indorsees who took the bill for value, *with notice of the contract*, but without notice of a breach."

Denio, J., delivering the opinion, observes, with equal force and accuracy, (p. 232:) "If one will issue his negotiable paper and send it into the world, in consideration of an engagement of the party with whom he deals to do some act for his benefit in future, he declares in effect that he will pay the note or bill, according to its terms, to any one who shall become the holder for value in the course of business, and rely for his own indemnity upon the promise he has received as the consideration for issuing it."

VII.

It is respectfully submitted that the court below has committed the double error of admitting incompetent evidence, and rendering a wrong judgment on the facts supposed to be established by that evidence; and it is also submitted and urged, that the facts found not only do *not* warrant a judgment for the defendant, but *do* entitle the plaintiff to judgment; *and that, since the amount to be recovered is mere matter of computation, the judgment below should be reversed and the cause remanded, with directions to enter judgment on the special findings, for the plaintiff, for the amount claimed.*

John N. Rogers, and
Richman & Carskaddan,
Counsel for plaintiff in error.

Supreme Court of the United States.

No. 99.

SAMUEL C. SMITH, PLAINTIFF IN ERROR,

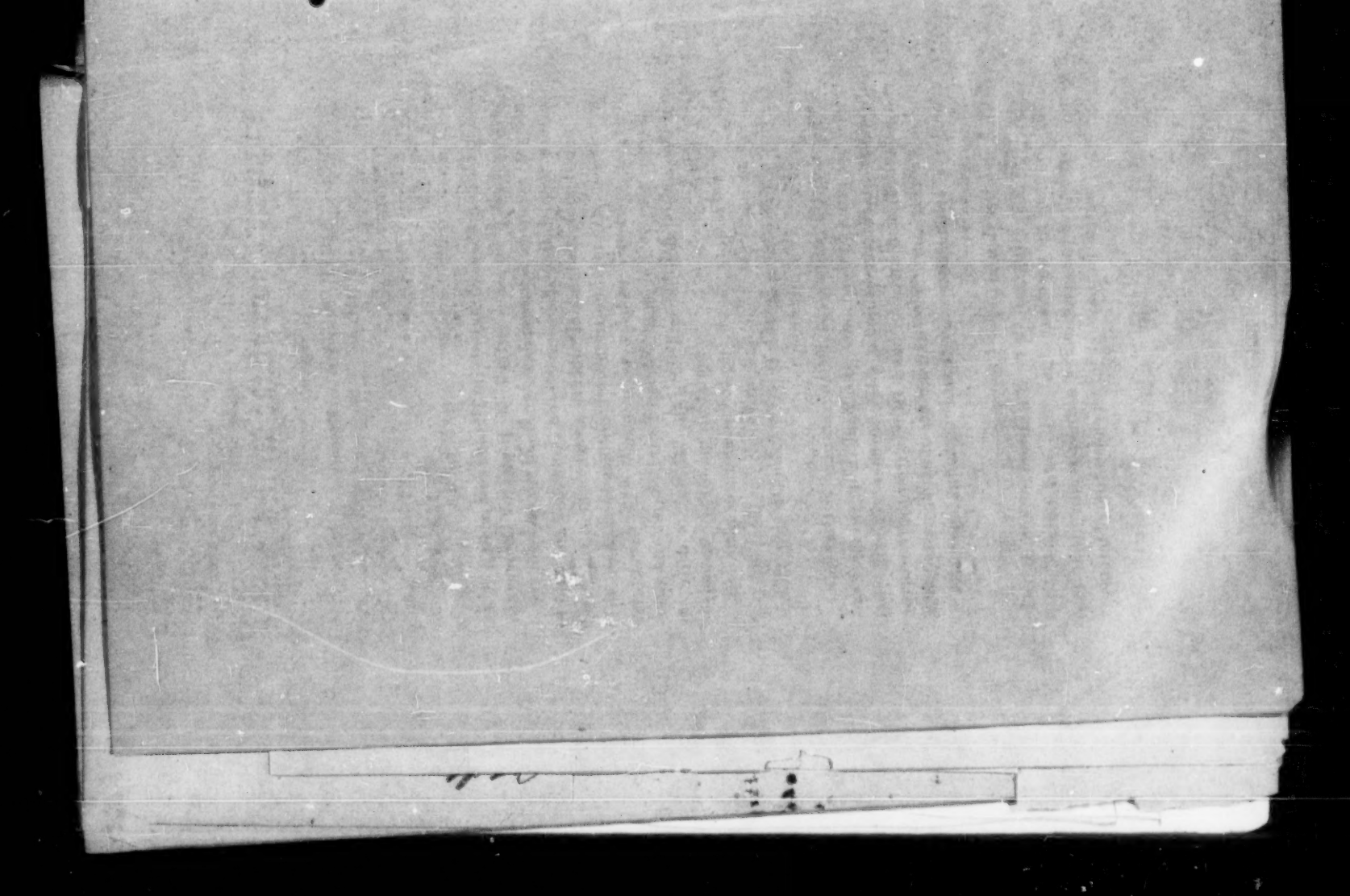
vs.

THE COUNTY OF SAC, IN THE STATE OF IOWA,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

GALUSHA PARSONS,
Of Counsel for Defendant in Error.

Gibson Brothers, Printers, Washington.



Supreme Court of the United States.

SAMUEL C. SMITH, Plaintiff in Error,
against
THE COUNTY OF SAC, IN THE STATE OF IOWA, Defendant in Error.

Brief for Defendant in Error.

This action was brought in the circuit court of the United States for the district of Iowa, to recover the interest—secured by coupons—claimed to be due upon certain bonds alleged to have been issued by the county judge of the defendant, October 1, 1860. The bonds, ten in number, are for one thousand dollars each, and upon their face purport to have been issued "in accordance with the vote of the legal voters of said county, at a *special* election holden on Saturday, the 7th day of July, A. D. 1860, pursuant to a proclamation made by the county judge of said county, according to the statutes of the State of Iowa in such case made and provided, *for the purpose of erecting a court-house* in Sac City, the county seat of said county, *as per said proclamation*."

The plaintiff claimed to be the owner—"that he received the same in good faith and paid value therefor"—of twenty-five of the coupons. He further claimed that coupons 2, 3, 4, 5 and 6 of bond 10, "through the error and mistake of the officers and agents of said county, were made payable one year later than their actual maturity."

The answer is in effect—

I. A general denial.

II. That one Eugene Criss, claiming to act as the county judge of the defendant, entered into a contract with one Meservey for the erection of a court-house; that the bonds were issued in payment therefor; that Meservey

No such purpose is indicated upon the face of these bonds. The language is: "Such bonds being issued, * * * for the purpose of erecting a court-house." I submit that the distinction between issuing bonds to secure the payment of money actually advanced to the county and issuing bonds directly to the contractor before the work is done is both obvious and substantial.

The cases in which this court has held that municipal corporations under the power to borrow money may issue their bonds directly to the company to be benefited are, in my judgment, distinguishable from the present in several respects. In those cases the money was to be paid, and at once, to the railroad companies. In this the money goes into the county treasury, and remains there until the *contract* shall be submitted to the people and approved by them; and then shall be disbursed only upon the warrants of the county judge as the work progresses.

Rev. secs., 293, 360.

The statute does not give the county judge the power, even with the approval of the people, to borrow money and at once to pay it out. His powers in the management of the financial affairs of the county at the time of these transactions were very great, and were very much abused. To guard against abuse by a misappropriation of the county funds, the statute provides, in terms exclusive of any other mode, the manner in which they shall be drawn from the hands of the treasurer.

It appears to me that these are reasons for a *strict* construction of the power to borrow money which did not exist for such a construction of the railroad acts which have been before this court. In the one case, the law contemplates that the application of the money shall at once pass from the control of the municipal corporation, the railroad company becoming morally, perhaps legally, its

trustee; in the other, the money remains in its treasury, subject to its own control.

Gould *vs.* The Town of Sterling, 23 N. Y., 459.

II.

After the change in the law, the county judge could not submit this question at a special election on the 7th of July, 1860.

Rev. sec., 312; sec., 23.

Yant *vs.* Brooks, 19 I., 87.

The purposes of the act were:

1. To declare, perhaps to define more clearly than was done by existing laws, what powers the counties of the State should possess.

2. The officers by whom and the manner in which they should be exercised.

As above stated, in its general provisions, the act took effect on the 4th of July, 1860, but that portion which relates to the officers through whom these powers should be exercised did not take effect until January 1, 1861.

Rev. secs., 25, 324.

The erection of public buildings is among the specified powers. "When the probable expense shall exceed two thousand dollars, the question shall be submitted to vote at a *general* election." It is true, that the limitation upon the exercise of the power is by name addressed to the board of supervisors, but the power itself to erect this class of buildings was somewhere, between the 4th of July and the 7th of January. I suppose it to have been in the electors, and that they were to exercise it in accordance with the laws in existence at the time of its exercise. The officer by whom the question of its exercise should be submitted to them remained unchanged until the 1st of January, but as to the power itself, and when and how the people should express their sense upon the subject, I submit that the new law was in force upon the 7th of July.

III.

The time of payment exceeded ten years.

1. The statute provides that the rate of tax shall be such as to pay the debt in ten years.

I suppose the fair construction to be, that the securities could not run beyond that period.

Rev. secs., 252-53.

2. The bonds were issued "as per proclamation." The proclamation being expressly referred to, I suppose the taker is chargeable with a knowledge of its contents. It provided for payment in ten years instead of eleven.

IV.

Assuming that the county judge could borrow money for the erection of a court-house; that such was substantially this transaction; that it was properly submitted at a special election; that the bonds were made payable according both to the law and the proclamation, and that upon their face they import all this, still I submit that they do not import enough to authorize the purchaser to take them without further inquiry. The statute fixes the time when the acts of the county judge and of the people should take effect:

"The result shall be entered at large in the minute-book, * * and from the time of entering the result in relation to borrowing or expending money shall have the effect of an act of the general assembly." (Rev. sec., 255.)

The bonds do not import that this was done, unless it is sufficient to say that they were issued for the purpose of erecting a court-house, without adding either by a statement of the proceedings, or, generally, that the requirements of the law had been complied with.

V.

The plaintiff, by his petition, and upon the trial, having assumed a knowledge of the proceedings upon which the bonds were based and the burden of maintaining their sufficiency, cannot now insist upon an estoppel. While it does appear that upon the trial he claimed to be a *bona fide* holder for value, it does not appear that he was in fact such holder. It might have been sufficient for him to have relied upon the legal presumption in his favor, when the court would have found, in the absence of evidence on the part of the defendant, that he was such holder. The evidence as to how he became possessed of the coupons is not contained in the bill of exceptions, nor does it appear by the findings of the court that he was a *bona fide* holder. The presumptions being in favor of the correctness of the judgment, if it is necessary, in order to uphold it—the record being silent—it will be presumed that it appeared that the plaintiff took with knowledge. The only finding in his favor is, that he became such holder by transfer before maturity.

VI.

The county judge had no power to bind the county by a contract made by him while not within his territorial jurisdiction.

The law requires him "to keep his *office* at the county seat." (Rev. S., 240.) Of course this cannot refer to him in his judicial capacity. As a court he has no *office*, the place where the courts shall be held is otherwise provided for; this provision can only relate to him as the manager of the financial affairs of the county. By section 247 it is provided that in his absence the clerk shall act in his place, and that in the absence or legal incapacity of both the prosecuting attorney of the county shall discharge the duties of his office.

The rule has been so often declared by the courts, and is so generally laid down by elementary writers, that all public officers must discharge their duties at the place fixed by law, must act within their territorial jurisdiction, that there can be no *excuse* for discussing it here. By the rule contended for by the plaintiff below, the office is not only *portable*, but there are two persons legally competent, and, of course, if competent, *compellable* to discharge its duties at the same time. By section 241, it is provided that the county judge shall be the keeper of the county seal. Sec. 222 describes the seal. He shall use it in the execution of contracts. (Sec. 244.) County warrants shall be under seal. (Sec. 360.) Shall he carry the seal with him to the city of New York, and there execute these instruments, while his temporary successor at home is doing the same with another seal; or by what legal rule shall we measure the *time* of his absence to determine the validity of his acts? I submit that when he leaves his county, he leaves his office behind him; that all instruments then executed by him in his official name are void, and if done *malo animo*, are forgeries.

The claim of the plaintiff reduced to its simplest form of expression is, that he can *partition* his office; leaving its judicial duties in Iowa while he carries its financial powers into Wall street; that in either place he can act as county judge—general manager of *local* affairs—of one of the counties of Iowa, and at the same time perhaps as alderman of one of the wards in the city of New York. Argument cannot make the absurdity of the claim more apparent.

VII.

But it is said, even if he could not properly or legally discharge this class of duties at any other place than within his county, the defendant will not be permitted to raise the question, that it is estopped by the *recitals* in the bonds.

What kind of a recital is that which estops a party who did not make it?

To say that no recital contained in an instrument can bind a party until it is proved that he executed the instrument, is but the statement of a truism. There is, however, no question of recital in the case. The supposed recital is simply the concluding clause of the bond—the time and place of execution. To say that the defendant cannot raise that question is to say that *non est factum* is not an available plea. That "it contradicts the bond" is certainly true; but no solemnity of form, or of language that I have ever heard of, precludes a party from saying that it is not his. I suppose the rule to be, that the facts and circumstances immediately attending the execution of an instrument, the *res gestæ*, are always open to inquiry, and may be put in issue by the plea of *non est factum*; that there is no rule of estoppel or of commercial law that will preclude the party from doing that. If the subject of the inquiry be a negotiable instrument in the hands of an innocent holder, and the evidence falls short of showing that it is not the instrument of the party, it may not be a defence, but if it does show that, there certainly cannot be any rule of law which will enable *any* holder to recover.

It was for this purpose, and with this understanding of the law, that the evidence was offered as tending to show that the bonds were void.

1. Because of the place (for the reasons above stated) of their execution.

2. Because of the place and the circumstances attending their execution, including the intent of the parties; in connection with the facts in evidence when the offer was made, that they were issued entirely without consideration—the contract to build a court-house in a county with less than fifty voters to cost ten thousand dollars, entered into by the county judge as he was about to go out of office, being a mere sham; that no court-house was built; that there was at that time no evidence of the pro-

ceedings among the proper county records; that the county judge received or retained one of the bonds for his own use; that the plaintiff had given no evidence of the manner in which he became possessed of them, or how they got into circulation, and the length of time after they fell due before they were put in suit. I supposed circumstances like these were competent for the purpose of establishing either that the bonds were void for the want of power, or that they were for the like reason, and an intent to defraud, forgeries; I now submit that upon either ground the defendant was entitled to judgment.

The foregoing are the only legal questions which I suppose this case to involve. The propositions which I have sought to maintain are in the main *as applied to this case* the converse of those which I find discussed by the argument filed by the plaintiff in error, with the exception of plaintiff's fourth point, the controversy is rather as to the question, which side of these propositions the facts support, and the deductions which they will warrant, than as to the law which governs the case, applying the same statutes and the same legal rules to the facts of the case, we arrive at opposite conclusions.

REPLY TO ARGUMENT FOR PLAINTIFF.

Second Point.

"It will be conclusively presumed in favor of a *bona fide* holder for value."

1. It does not appear, either by the evidence or the findings of the court, that plaintiff was such a holder.

2. After the evidence given by the defendant as to the issuing of the bonds, it was incumbent upon the plaintiff to *prove* that he received the coupons for value, and without notice.

2 Parsons, on B. and N. 438.
Story, on P. N. S. 196.
Monroe *vs.* Cooper, 5 Pick, 512

"When a bill or note is shown to have originated in illegality or fraud, a presumption arises that a subsequent holder gave no value for it, and such a presumption will support a plea that the holder is a holder without consideration, unless rebutted by the plaintiff showing that he gave value."

Fitch *vs.* Jones, 24 L. J. Q. B. (N. S.) 293.

Second Paragraph of Second Point.

The distinction between what is "conclusively presumed" and an estoppel it seems to me is a distinction without a difference.

Third Point.

1. The plaintiff errs as before in assuming that he was a *bona fide* holder, &c.

2. In assuming that a defence which goes to the essence of the paper would not be good against such a holder.

1 Parsons on B. & N. 275.

3. That the court has found that he took the paper without notice as to the time when the proceedings were entered in the county records.

4. That there is any "statement on the face of the bonds that this step had been taken."

5. In assuming that a record is perfectly authentic, which is made by one who has no jurisdiction of the subject.

6. In assuming that there is a distinction between "going out of office" and being divested of official powers.

For what purpose bonds may be issued, how the question shall be submitted to the people, and when the proceedings take effect, I have considered under points one and four of my original brief. I may add, as another reason why the legislature could not have contemplated

the construction claimed, that the bond of the county judge in the sparsely settled counties of the state—where public buildings were most likely to be erected—was merely nominal. "Ten times greater than his salary." (Rev. S., 277.) His salary in counties having, by the census report, a population of less than five hundred, was fifty dollars. (Rev. S., 422.) The census report shows the population of Sac county in 1860 to have been 246. Three years after it was only 234. At this time it scarcely exceeds one thousand.

The bond of the county treasurer is ample, and it is his duty to receive and disburse all money payable to the county. (Rev. S., 360.)

Fourth Point.

I have no means of knowing whether "the judgment below for the defendant was entirely rested" upon the ground here stated or not. I think it might well have been; but I do not see in that any reason why we should not in this court be permitted to stand upon other grounds as well as that, if equally tenable. Under the sixth point of my original brief, I have endeavored to maintain the position that the acts of the county judge, when absent from the county, were void. The position of counsel upon this subject assumes, as before, what does not appear, that the plaintiff was a holder for value and without notice, and completing his premises by two additional erroneous assumptions: First, that the statement of the time and place of execution is a recital; and second, that it operates as an estoppel, he proceeds to show by arguments very plausible indeed, that the statute should not be held to mean what it says.

"In order to a correct understanding" of the statute, he says: "The county judge is the *general agent* of the county," and for this refers to section 106 of the *Code* of Iowa. The section was omitted in the Revision, (S., 242;) but while this statute was a part of the law, the language

of the supreme court of Iowa in reference to it was: "A good deal has been said about the county judge being an agent, the agent of the county, and on one side, he is called a special agent, and much argument has been drawn from this relation. The analogy between this officer and an agent will hold good but a little way. It does not hold good in any valuable sense. It is true that the statute in creating him, styles him the general agent of the county, but this is not to institute this relation properly; it was to declare him to be their general rather than the special agent of the county; at the best he is but a *quasi* agent. Properly speaking, he has no principal; and so far as he has, this principal only appoints him, and has no further power over him. He does not derive his powers from the county, but from the law, and the county cannot revoke them; it cannot act itself in any case. He is the head and hand of the county; in short, he is an officer of the law, deriving his power from the law, and governed by it."

5 Iowa, 55.

In general, the doctrines of principal and agent are not applicable to public officers, and persons dealing with them are bound to inquire as to their authority to bind the Government. The statute is their power of attorney. As to the supposed distinction between such acts as are done in court and those which are done simply as judge, the same court says: "The county judge and the county court are made up of one and the same functionary, and the powers conferred upon one are indiscriminately blended with the other. * * * * * * The county judge and the county court are one and the same thing; all the powers and duties devolving upon one may be exercised by the other. * * All official acts of the county judge, then, are acts of the county court, whether judicial or ministerial, and so far as jurisdiction goes, county judge and county court are convertible terms."

4 Greene, 349, 50.

In referring to section one hundred and eleven, Revision,

counsel says: "It is quite manifest that it has reference chiefly, if not exclusively, to the judicial functions of the judge," but in the same paragraph he adds: "As a *matter of course*, the judge, when absent from the county, could not hold his court or discharge *any judicial function* any more than if he was not judge at all, and this disability *in no degree results from the section in question, but from the necessity of the case.*" If this is so, what effect can this section possibly have unless it is held applicable to his administrative and ministerial duties? Where the courts shall be held. (Rev. S. 2687, 14 I., 264.) The county court is always open. (S. 261.) Where?

In speaking of the powers of the county judge as the general, financial, and business agent of the county, and of the county itself to contract, he says: "It cannot be presumed that the legislature intended to *disable* a county in its corporate capacity from entering into a contract, or making a purchase, unless done within in its own territory.

This position must be based upon the presumption that corporate acts are valid, unless prohibited. I do not so understand the law; The language of Chief Justice Marshall is: "The act of incorporation is, as to them an *enabling* act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must pursue that mode, or the instrument no more creates a contract than if the body never had been incorporated." Or, as in the Dartmouth College case, "A corporation being the mere creature of law, possesses only those properties which the charter of its incorporation confers upon it, either expressly or as incidental to its existence."

The language of the supreme court of Iowa is: "Every attribute, liability, and obligation of a county is fixed and defined by law." "Considered with respect to their powers, duties, and liabilities, they stand low down in the scale or grade of corporate existences." (26 I. 267.) The test of power is, "What is the grant?"

In Hull and Argalls against the county of Marshall, cited by counsel, the court say: "A county is a political sub-division of a State, invested with certain limited and specified powers, which are divided among, and are to be executed by a class of agents, or county officers, appointed for that purpose. Their duties are not only defined, but their mode of performing them is, in many instances, prescribed by law; especially those which relate to the fiscal operations of the county, and the raising of money by taxation. When this is done, it is a well settled maxim that the power must be exercised precisely as it is given. Indeed, it is a general rule that when a statute confers special ministerial authority, the exercise of which may affect the rights of property or incur a municipal liability, it should be strictly construed, and as strictly observed, and that any departure will vitiate the whole proceeding."

I suppose these rules, in the absence of any statute upon the subject, to be equally applicable to the place in which the corporation shall exercise its powers as to the powers themselves, and the manner of their exercise. By this I do not mean that a corporation, whether public or private, cannot employ the ordinary means of transacting its appropriate business. As I understand it, all acts which, either by the act of incorporation or in their nature, are to be done by the officers as a board of officers representing the corporation, must be done within its territorial limits, and that this is especially applicable to acts of corporate legislation.

The language of Angell and Ames on corporations is: "It by no means follows, however, that because a corporation may, by its corporate agents, general or special, act and contract without the limits of the State which created it; that the corporation itself may meet out of the State, and there create and authorize its agents." (S. 274.)

The language of this court (13 Peters, 588,) is: "It must dwell in the place of its creation,"

To apply these rules to this case: the defendant possessed certain specified powers to be exercised by the officers, in the manner, and at the place fixed by law, and not otherwise. I think this would be the law were there no statute in relation to the subject; but with a statute fixing the place where the county judge shall keep his office, and designating another to act in his place during his absence, it seems to me the question is placed beyond debate.

I submit that the argument to be drawn from the distinction made by counsel between the financial and judicial duties of the judge is against him. Most of the affairs of the county are by name to be managed by the "county judge," but the "erection and reparation of court houses" is given in terms to "the county court." (Rev. S., 265.)

"It is the delivery, not the signing and sealing, which gives effect to the instrument. * * * It might be done by any duly authorized agent."

1. I suppose counsel would hardly claim that the delivery of a *blank*, or what is the same thing, an instrument formally complete, but which the party has no right to execute, would bind any one.

2. In Miller *vs.* Ewer, (14 Shepley, 509,) the precise point—that the corporation *might* have appointed an agent—was made, and the court say—I quote from memory—"it is sufficient to say no such thing was done."

Fifth Point.

This division of the argument, like the preceding, is built upon the assumption that the plaintiff is a *bona fide* holder within the law merchant. I have given my reasons for supposing that he cannot be so considered upon this argument.

1. The court below has not so found.

2. All presumptions are in favor of the correctness of the judgment.

3. The claim is based solely upon a legal presumption

which ceased to exist when it was shown by the defendant that the bonds were fraudulently issued.

"If the negotiable bonds of a county authorized by law, and authenticated upon their face by the proper official signatures and seal, get into circulation improperly through the malfeasance or misfeasance of the county officers * * * they must be paid."

I do not understand the decisions of this court to go to this extent. The rule which they establish, as I understand it is, that municipal bonds, authorized by law, negotiable in form, and upon their face importing a compliance with the law, have all the qualities of commercial paper.

1. This certainly does not imply that paper which has improperly got into circulation through the malfeasance of a public officer can be collected in the hands of any one As counsel says, "it is the *delivery* which gives effect to the iustrument;" if this delivery is an act of malfeasance, a crime, not even the necessities of commerce have sanctifying power enough to redeem it. Counsel does not seem to distinguish between acts which are merely irregular and those which are criminal. The former may not be a sufficient answer to a *bona fide* holder of paper like this; but in what case has this court, or indeed any court, decided that the criminal acts of public officers bind the public? The supreme court of Iowa discussed somewhat the subject of a want of power in Clark *vs.* the city of Des Moines, and the same against Polk county, 19 Iowa, 199, 248. "If my name be signed to a promissory note by a person representing himself as my agent, but without any authority from me, I am not bound; and I am no more bound because the obligation has been put in a negotiable form than if it had been put in a form not negotiable. And the same rule must, and does apply to paper purporting to be issued by agents or officers of public or municipal corporations. * * * Negotiable instruments will not validate obligations which are not binding, because of a

want of power to execute them. * * * The negotiability of the note will have no effect upon the question, as the inquiry bears upon the existence of the note itself. The term negotiability presupposes the existence of an instrument made by a person having power to contract in that particular manner. * * * A warrant issued by a mayor and recorder without the previous order of the council is void, they have no authority to do it; it would be substantially a forgery."

That this language correctly expresses the legal rules applicable to the subject can hardly be debatable. They are in accordance with the elementary writers, and I do not think they are in any degree in conflict with the rules declared by this court in the series of decisions referred to by counsel. In none of those cases was there any question of jurisdiction or of power in the officer to do the act at the time and place, provided the corporation had the power, and the proper preliminary proceedings had been had to authorize its exercise in the particular instance. Upon that subject the cases establish the rule that the officer is the judge, and if the instrument imports a compliance with the law the taker need inquire no further. But nowhere does the language of this court give any sanction to the idea that when a public officer in *the very act of issuing* the paper commits a crime, his acts bind the public—or that any rule of commercial law, or of estoppel, or that any degree of good faith in the holder, can give validity to forged paper, or to paper which the law did not authorize the party or the officer under *some* circumstances at the time and place to issue.

2. "Is it to be held that every purchaser of such securities must ascertain at his peril whether the officer who executed them on behalf of the county was physically within its boundaries?" Certainly, if his power depends upon that; and this is no more than the law requires of every purchaser of the negotiable paper of individuals; the purchaser must, at his peril, ascertain that it is genu-

ine, if executed in the name of another, that he had authority for that purpose, the capacity of the apparent maker; in short, that the paper is what it purports to be. The effect of good faith in the purchaser is to deprive the maker of the right to insist upon equities which may exist between him and the payee, and not to *create* an obligation. In the language of Parsons, already referred to, "the *bona fide* holder of negotiable paper before dishonor is not protected against those defences which go to the essence of the paper."

Sixth Point.

The consideration for the delivery of the bonds to the contractor.

The claim of the defendant upon this subject was—assuming that the bonds were properly and legally executed—that:

1. The only purpose for which they could be used was to *borrow money*.

2. If they could be properly delivered to the contractor that, this could not be done in advance, for the reasons, first, that the statute provided that the work should be paid for only as it progressed; and second, if there was no statute prohibiting it, there was none authorizing it.

3. That the delivery of them to the contractor under the circumstances, and for the consideration from him to the county judge—the return of one of the bonds—was a *conversion* of them, as "it is the delivery which gives effect to an instrument," if that act is a *conversion* of it, I suppose it will hardly be claimed that it could take effect as a *contract*.

If I may paraphrase somewhat liberally the language of Judge Denio, quoted by counsel, this paper was sent into the world in consideration of an engagement which the officer had no right to make, at a place where he had no

right to be, and for a reward which it was criminal for him to receive.

It is submitted that the court below committed no error either in the admission of evidence or the judgment which it rendered upon the facts.

GALUSHA PARSONS,
For the Defendant in Error.

16 Vt 125

11 Ired Eq 655
5 Mack 784
Mcd 29 Alleg 289
Jerusalem p 11

county purchased not
bind the county - because
no seal - no power
stated -

see 293 Revision
Bond Lord 82 -
Wheeler 2 Cases 20
Peck 547
4 Wall 270-276
12 Ired 142-159
23 Ark 467

Mr. Justice Clifford.

The United States Supreme Court.

SAMUEL C. SMITH, PLAINTIFF IN ERROR,
vs.
THE COUNTY OF SAC, IOWA. } No. 99.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

The act of Congress authorizing the trial of issues of fact in the circuit courts, by the court, without a jury, (act of March 3, 1865, sec. 4, 13 Stats. at Large, p. 501,) provides that "the finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States, upon a writ of error or upon appeal; provided the rulings be duly presented by a bill of exceptions.

"When the finding is special, the review may also extend to the *determination of the sufficiency of the facts found to support the judgment.*"

This undoubtedly puts the "special finding" upon the precise footing of a special verdict at common law.

In this case the "sufficiency of the facts found to support the judgment" is the subject of inquiry.

The court, having found specially certain facts, (*not including* the fact that the plaintiff took the instruments sued on, *with notice* of any defence or equity affecting them, or without giving value for them,) has adjudged that "as matter of law arising upon, and resulting from,

the facts hereinbefore found, * * * the said bonds and coupons *are wholly void* as against the said county of Sac, and that the defendant is entitled to judgment;" which was rendered accordingly.

It is sufficiently obvious, I think, from the very *terms* of this adjudication, that the question whether or not the plaintiff was a holder in good faith and for value did not in fact at all enter into or affect the decision of the case in the mind of the judge who pronounced it; but that he held the bonds to be "wholly void as against the said county," entirely irrespective of the attitude of the holder.

The question now arises, however, whether this court can *import into* the special finding, by *intendment*, the additional fact that plaintiff is *not* a holder in good faith and for value, on the ground that fraud in the issue of the bonds is found; that this cast on the plaintiff the burden of proving himself to be a holder for value without notice; and that the verdict does not find affirmatively that he *was* such holder.

Can the verdict be thus aided by intendment? I submit that clearly it cannot.

Assuming, for the purposes of the argument, (what, however, I respectfully *deny* to be law,) that a *special* verdict can supercede the necessity of a plea, and by specially finding matter of defence *not pleaded*, and therefore not in issue, entitle a defendant to judgment thereon; and further assuming, (what I also maintain is not the case,) that the facts found *do* amount, as mere matter of law, to fraud, and not merely to *evidence* tending to show fraud, I submit that a *plea* of such fraud, had one been interposed, would have been fatally defective on demurrer, if it did not contain an allegation that plaintiff took with notice, or without giving value. What, then, it is necessary that the plea should *allege*, is it not equally necessary that the verdict should *find?* Otherwise, one-half of the issue, as material as the rest, is left undetermined on the

record. *How* it would have been determined, had it been determined at all, this court, on error, cannot say; it remains in the breast of the judge (or jury) who tried the issue. The rule as to the burden of proof is *merely a rule of evidence to govern the court or jury on the trial in making up the verdict.* It cannot supply the place of or supplement the verdict. There is no legal *certainty* that, because a fact is not expressly found in a special verdict, it was not proved. Hence arises the *absolute necessity* for the rule, which, it is believed, all the authorities recognize, that a special verdict to be good must find *all* the facts essential to entitle one party or the other to judgment, and that it cannot be aided by intendment or presumption. If it were not so, the parties would be left entirely at the mercy of the judge or jury trying the case; for the parties can exercise no control over either judge or jury in framing the verdict. They cannot *compel* a finding either way upon any particular issue of fact. *What* facts shall be found, and what shall be *omitted* to be found, are entirely in the discretion of the tribunal (be it judge or jury) trying the issue. A material fact may be thoroughly proven, and yet a jury bringing in a special verdict may omit to find it, through inadvertence or otherwise; and a judge may do the same thing, if not so probably from inadvertence, from mistaken views of the law as to *what* facts are material and what are not. If he has formed an opinion that certain facts, of the existence of which he is satisfied, are sufficient to authorize a judgment, he will not be likely to trouble himself to pass on *other* issues which he regards as immaterial, especially if to do so would require the weighing and sifting of conflicting evidence. In such case he will be very apt to pass them over in silence.

Now, in such a case, the party against whom the judgment is rendered, on a finding of facts insufficient in themselves to support the judgment, is absolutely *remedi-*

less, if the court of error is at liberty to add to the verdict by intendment, on the ground that a state of facts which he was bound to prove, *not* being *affirmatively* found, must be presumed not to exist. He may have proved it beyond question, or by a preponderance of evidence, and yet the court or jury may have omitted to find it, for one or the other of the reasons already suggested. If the fact is found *either way*, and the finding is against evidence, a motion for a new trial on that ground will afford the remedy. But if there is an entire *omission* to find *either* way upon the issue, and a finding upon it is an essential element in the facts on which judgment is to be based, there is *no* remedy, except to hold the verdict defective, and award a *venire de novo*. If in a court of error, it can be aided by intendment; if a fact essential to support the judgment, but not found by the verdict, can be assumed, because the burden was on the opposite party to prove the *contrary*, and the *contrary* is not found, then there is no safety for the rights of parties in case of a special verdict, since the judge or jury may find or *omit* to find upon such issues as they please, and are subject to no control in the selection.

In support of the foregoing views I refer to 2d Tidd's Practice, (4th Am. ed., 1856,) p. 896, (marginal page 897,) *note* A; where all the authorities, and particularly the *American* cases, are cited. See, also, Barnes *vs.* Williams, 11 Wheat., 415; Blake *vs.* Davis, 20 Ohio, 231.

Gould's Pleading, chap. 10, sec. 62.

"Thus, if in trover, on the general issue pleaded, the jury return a special verdict, finding the property in the goods to be in plaintiff, the loss of them by him, the finding of them by defendant, *and the refusal of the latter to restore them on plaintiff's demand*, without showing any fact either amounting to a conversion or disproving it, the court can render no judgment on the verdict, for the conversion is neither found nor denied by it; the demand and refusal being only *prima facie evidence* of a conversion." Gould's Plead., *ubi sup.*

20 Howd. 432

6 Wheat 432 [illegible]

6 " " 1 "

19 Wall 102

I feel constrained to urge this point with earnestness, it may be with pertinacity, both because it seems to me to be clearly well taken, and because I am convinced that great injustice would be done to my client by a decision against him, on the ground that he is *not* a holder in good faith and for value. I am advised and *believe* that he *is* such a holder, and can fully substantiate it by proof. The case was not, in fact, decided against him below, on any such ground; nor was the point there made, that by the proof of fraud, as between the county judge and Messervey, the burden of proof was thrown on him to show good faith. If it *had* been made, his counsel would have applied for a continuance, in order to give opportunity to furnish the required evidence; and in view of the fact that the evidence of fraud had been sprung upon them, without any plea of fraud, would doubtless have obtained the indulgence. The argument and the *decision* were put on grounds invalidating the bonds, (as it was claimed,) in *whosesoever* hands found. As already observed, the very language of the decision in the record, as I think, clearly imports this. And the great stress of the argument *here*, for the county, has been directed to an attempt to sustain the same positions.

If the court are prepared to adopt these extreme views, and to hold these bonds "absolutely void as against the county," without regard to the character of the holder, then, of course, there is an end of our case.

But if they are *not* prepared to go to that length, I respectfully submit that the ends of justice will be better satisfied by the award of a *venire de novo*, which will give both parties full opportunity to establish all material facts, than by resting an affirmance of this judgment upon a defence not pleaded, and on a fact not found, and (to say the very least) perhaps not existing.

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of Counsel for Plaintiff in Error.